83 - 1516

No. ....

IN THE

Supreme Court of the United States

C & H TRANSPORTATION CO., INC.,
Petitioner

vs.

FRONTIER AIRLINES, INC.,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI BY C & H TRANSPORTATION CO., INC.

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214/696-0055

Attorneys for Petitioner

TO THE COURT:

C & H Transportation Co., Inc. (C & H or Petitioner) presents to the Court this Petition for Certiorari of the decision by the Fifth Circuit Court of Appeals favorable to Respondent Frontier Airlines, Inc. (Frontier).

QUESTIONS PRESENTED FOR REVIEW

1. The Court of Appeals erred in affirming the Trial Court by concluding that a regulated common carrier obligated to collect freight charges based on published tariffs can be estopped from collecting from a consignee and/or beneficial owner of the goods contra to *Louisville & N.R.R. v. Central Iron & Coal Co.*, 265 U.S. 59, 70, 44 S.Ct. 441, 444, 68 L.Ed. 900 (1924) and *Pittsburg, C.C.&St. L. Ry. v. Fink*, 250 U.S. 577, 40 S.Ct. 27, 63 L.Ed. 1151 (1919).

2. Whether a summary judgment was proper when genuine issues as to material facts existed relating to the critical elements of estoppel sufficient to relieve Frontier of its liability for the freight charges as a matter of law contra to an earlier decision of the Court of Appeals, Fifth Circuit in *Chavez v. Noble Drilling Corp.*, C.A. La 1978, 567 F.2d 287 relating to Summary Judgment.

LIST OF INTERESTED PARTIES

The list as it relates to the Respondent is taken from the list submitted to the Court of Appeals:

C & H Transportation Co., Inc., Petitioner, is a Texas corporation. The parent corporation is The Tyler Corporation,

a publicly held company. The other subsidiaries and affiliates of the Tyler Corporation are:

Tyler Corporation	Dallas, Texas
C & H Transportation Co., Inc.	Dallas, Texas
C & H Freightways	Phoenix, Ariz.
C & H Forwarding Co., Inc.	Dallas, Texas
Tyler Pipe Industries, Inc. (Delaware)	Tyler, Texas
Tyler Pipe Industries of Texas, Inc.	Tyler, Texas
Wade, Inc.	Tyler, Texas
Tyler Pipe Industries, Inc. (Penn.)	Tyler, Texas
East Penn Foundary Co.	Macungie, Penn.
Tyler Plastic Co.	Tyler, Texas
Swan Development Co.	Tyler, Texas
M. J. Harvey Foundation	Tyler, Texas
Atlas Powder Company	Dallas, Texas
Hall-Mark Electronics Corp.	Dallas, Texas
Kinepak, Inc.	Dallas, Texas
Oriard Powder Co., Inc.	Deer Park, Wash.
Tyler Tank Cars, Inc.	Dallas, Texas
East Kentucky Explosives, Inc.	Prestonsburg, KY
Atlas Slurry Company	Dallas, Texas
Tyler Leasing Company	Dallas, Texas
B & H Explosives	Coeburn, Virginia
West Kentucky Explosives	Madisonville, KY
Explo-Midwest, Inc.	Joplin, Missouri
Powder River Explosives	Billings, Montana
Bolt-Lock, Inc.	St. Louis Prk., MN
Hazard Explosives	Hazard, Kentucky
C & H Warehouse & Rigging, Inc.	Dallas, Texas
Atlas International, Inc.	Miami, FL
Star Export Services, Inc.	Pearlington, Miss.
Tyler Transportation Company	Charlotte, N.C.
Tyler Aviation, Inc.	Charlotte, N.C.
Thurston Motor Lines, Inc.	Charlotte, N.C.
Thurston Aviation, Inc.	Charlotte, N.C.
Phoenix Fittings	Tyler, Texas

Reliance Universal, Inc.	Louisville, Texas
Leeder Chemicals, Inc.	California
Reliance Brooks, Inc.	Kentucky
Reliance Intl. Sales Corp.	Kentucky
Reliance Powder Products, Inc.	Illinois
Reliance Universal, Inc.	California
Reliance Universal, Inc.	Illinois
Reliance Universal, Inc.	New Jersey
Reliance Universal, Inc.	North Carolina
Reliance Universal, Inc.	Oregon
Reliance Universal, Inc.	Texas
Reliance Universal, Inc.	Virginia
Reliance Universal, Inc. of Ohio	Ohio
Reliance Universal, Inc. (B.C.) Ltd.	Canada
Reliance Universal, Inc.	Canada
Reliance Universal of Louisiana	Louisiana
Reliance Universal of Puerto Rico, Inc.	Kentucky
Reliance Universal, N.V. of Belgium	Belgium
Reliance Western Hemisphere, Inc.	Kentucky

Frontier Airlines, Inc. is a wholly-owned subsidiary of Frontier Holdings, Inc. (FHI). Approximately 51 percent of the stock of FHI is, in turn, owned by RKO General, Inc., which is a wholly-owned subsidiary of The General Tire & Rubber Company, Inc. There are also other wholly-owned subsidiaries of FHI, and these subsidiaries, in turn, have one or more wholly-owned subsidiaries or divisions.

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STATEMENT OF GROUNDS FOR JURISDICTION

The date of the decision sought to be reviewed by Petitioner was December 16, 1984. This is also the time the judgment was entered by the court.

The statutory provision believed to confer on this Court jurisdiction to review the decree in question by Writ of Certiorari is 28 U.S.C. §1254(1) and Rules 17(a) and (c), Supreme Court Rules.

STATUTES INVOLVED

These include 49 U.S.C. §§10744, 10761 and 10762; 28 U.S.C. §§1337; and 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This civil action was initially filed by C & H under the provisions of Title 28 United States Code §1337 which provides the District Courts have original jurisdiction of any Civil Action arising under any act of Congress regulating commerce. C & H, as a regulated motor carrier, performed transportation services in interstate commerce under tariffs filed with the Interstate Commerce Commission.

Pursuant to Frontier's Motion for Summary Judgment, the District Court entered a Judgment on April 8, 1983 that C & H take nothing by its suit against Frontier and dismissing the suit on the merits. Because this was a Judgment of Dismissal on granting Respondent's Motion for Summary Judgment, it was a final Judgment and appealable. *Poss v. Lieberman*, C.A.N.Y. 1962, 229 F. 2d 358, cert. den. 82 S.Ct. 1585, 370 U.S. 944, 8 L. Ed.2d 810.

C & H originally instituted this suit seeking payment from Frontier of freight charges due for transportation services related to the transporting by C & H of a product identified on the Bill of Lading contract as a "Passenger Vehicle Carrier" from Beaumont, Texas to a Frontier Airlines facility at Stapleton International Airport, Denver, CO. The charges sought were

$7,868.93 plus attorneys fees from Frontier and the City and County of Denver. Pursuant to a stipulation for dismissal without prejudice as to the City and County of Denver (TR125), the Trial Court entered an Order approving the stipulation and dismissing the case as to such Defendent without prejudice (TR127).

Frontier filed an answer essentialy denying responsibility for the freight charges and pleading estoppel as an affirmative defense. (TR12,14).

The parties pursued pretrial preparation including a request for admissions by C & H (TR16); Frontier's Answer to such request (TR23); Frontier's request for admissions (TR26); Frontier's interpogatories to C & H (TR34); the answers by C & H to such interrogatories (TR41); and the response by C & H to Frontier's request for admissions (TR45).

On October 4, 1982, Frontier filed a Motion for Summary Judgment (TR49), accompanied by an affidavit of a Frontier employee (TR52) and a Brief in Support (TR95). C & H filed an affidavit opposing Frontier's Motion (TR100) with a C & H employee affidavit attached in support (TR108). Frontier replied to the C & H affidavit. (TR112). C & H responded to Frontier's reply to such affidavit. (TR128).

The Trial Court filed a Memorandum Opinion and Order on April 8, 1983 (TR133) granting Frontier's Motion for Summary Judgment. (TR133). A Judgment was entered April 8, 1983 that Plaintiff take nothing by its suit against Frontier and dismissing the suit on its merits. (TR136). C & H perfected its appeal from the judgment to the Fifth Circuit of Appeals. On December 16, 1983, the Fifth Circuit of Appeals affirmed.

C & H is a motor common carrier regulated by the Interstate Commerce Commission, providing transportation service to the shipping public and charging rates authorized under published tariffs.

Frontier operates a passenger airline with headquarters in Denver, Colorado. In July, 1980, Frontier entered into a sales agreement with Ludwig Honold Manufacturing Company (Ludwig) for the purchase of six (6) terminal-to-airplane passenger vehicles. A Frontier purchase order issued for six (6) mobile lounges at a unit cost of $461,410. This price originally contemplated a $30,000 cost for freight and insurance. However, to be sure Frontier was the first to place this type vehicle in operation at Stapleton International Airport, Denver, two revised purchase orders were issued, the final one on May 11, 1981, whereby the cost of the first mobile lounge increased to $589,960.00 and the cost of the other five increased to $462,960.00 per unit. These figures included an additional cost of $127,000.00 for the expedited movement of the first unit (TR52-94). Frontier authorized the early shipment of the first mobile lounge FOB Denver, Colorado, with delivery no later than April 30, 1981. Frontier agreed the price for the expedited shipment would be $127,000.00 based on a shipping mode of barge from Wilmington, Delaware, to Houston, Texas, and truck to Denver, Colorado. However, if Ludwig, the manufacturer, could find an alternate and less expensive mode of transportation to Denver, then the expedited price would be renegotiated. (TR86). Under Schedule D of the contract, the delivery site was set for Frontier Airlines Hangar, Stapleton Airport, Denver, Colorado. (TR84).

The first unit was transported by barge from Wilmington, Delaware to Beaumont, Texas. The unit was unloaded at the city docks and picked up by C & H for transport to Denver on April 29, 1981. A representative of Frontier was present at the

loading in Beaumont. (TR54). C & H issued a Bill of Lading under which the shipment moved. (TR6). The freight charge, as established by the C & H published tariff, was $7,868.93. (TR8). On the bill, the block next to the phrase "to be prepaid" was checked. There was no indication on the freight bill that freight charges had been prepaid and the section provided to be filled in upon prepayment of freight charges was blank. (TR102). The shipment arrived in Denver on May 6, 1981 at the facilities of Frontier Airlines, Stapleton International Airport. C & H supervisors and top management level employees of Frontier, among others, were present. The C & H representative was lead to believe that Frontier Airlines rather than Stapleton International Airport was the consignee of the shipment. Two photographs of the shipment reveal the van was identified with the Frontier logo on the side. The shipment was off loaded at Frontier's facility at Stapleton in a fenced area used exclusively by Frontier. The Bill of Lading was altered by a person at Frontier's facility with everyone present to reflect Frontier Airline as the consignee. (TR109). Even Frontier's Counsel agreed for the purpose of the Motion that Frontier occupies a position analagous to a consignee. (TR97). The correction on the Bill of Lading to Frontier as the consignee was done without objection. In addition, the agreement between Frontier and Ludwig provided terms of payment by Frontier in Schedule C to commence June 30, 1980. (TR83). Frontier would have made large payments to Ludwig by May 6, 1981 sufficient to create a substantial beneficial interest and ownership in the mobile lounges transported by C & H. C & H asserts the shipment was actually received by Frontier and the name of the consignee changed to Frontier when an agent or employee receipted for the merchandise. (TR42,43). All parties appear in accord that the City and County of Denver were not the consignee and had no interest in the shipment.

A C & H representative after Labor Day, 1981 and probably around October 1, 1981, called the director of purchasing for

Frontier to advise freight charges were still due and to make demand for payment. (TR55,56). Ludwig, the consignor, filed a bankruptcy petition on November 9, 1981. A notice for meeting of creditors and automatic stay was not issued until March 29, 1982. (TR101,105). When C & H contacted Frontier, C & H was advised that it was not Frontier's problem. (TR101). After a written demand in May, 1982, Frontier again refused to pay C & H.

This shipment of the mobile lounge was the only shipment ever consigned to C & H or any affiliate by the consignor Ludwig. C & H had no dealing with Ludwig prior or subsequent to this shipment. C & H did not make any false representations to Frontier regarding the status of freight charges. C & H did not represent to Frontier the freight charges had actually been prepaid by Ludwig. Frontier representatives present at the unloading lead C & H to believe that Frontier was the consignee of the shipment and Frontier allowed the person receipting for the goods to alter the Bill of Lading to show Frontier as the consignee. (TR102,103,108). The total contract price to be paid by Frontier for the mobile lounges was $2,904,760.00. (TR53). During the period between May 12, 1981 and September 2, 1981, Frontier made payments of $907,000.00 leaving almost two million dollars in payments under the contract for which there is no explanation in the record. While the Frontier representative describes the payment on September 2, 1981, as the "final" payment, there is no indication whether additional payments were due by Frontier to Ludwig and not made under the contract. (TR55,56).

ARGUMENT

This Court has made it clear public policy concerns in the use of regulated common motor carriers must discourage the Courts in judicially implicating affirmative defenses to the collection of lawful freight charges. *Southern Pacific Transportation Co. vs.*

Commercial Metals Co., 102 S.Ct. 1822, 72 L.Ed.3 123, reversing 642 F.2d 236.

In recent years, an erosion of wise and basic concepts related to the area of the assessment and collection of freight charges has surfaced. This Court has not considered this question in a recent decision devoted to a discussion and determination of these issues related to equitable defenses in suits for the collection of freight charges by regulated interstate carriers operating under published tariffs. Perhaps the reason is the thrust for over sixty years has been to prevent discriminatory practices by regulated motor carriers, not only in the *charging* of freight rates, but the *collection* of freight rates. The regulated carrier operating under published tariffs must be paid, and must be paid in full according to the tariff rates. An agreement to take less will not bar recovery of the whole claim. *Southern Pacific Co. v. Miller*, 454 F.2d. 357 (CA 3, 1972). Damage claims cannot be offset against freight charges on regulated shipments. There can be no rebates in any form. To make the affirmative defense of estoppel applicable to the charging and collecting of published tariff rates places a crack in the seam of strong policies in the past.

The principle of the inviolability of a carrier's tariff provisions is based on the concern of preventing discriminatory practices between shippers. 49 U.S.C. §10762, *Illinois Steel Co. v. Baltimore & Ohio R.R.*, 320 U.S. 508 (1943), *Atchison, Topeka & S.F.Ry. Co. v. Springer*, 172 F.2d. 396 (7th Cir. 1949). As the Fifth Court of Appeals determined in a case where a gas company was held liable for tariff charges despite assurances that no charge would be made, "equitable considerations cannot . . . be invoked as the basis for an estoppel to collect [authorized tariff] charges . . . Filed tariffs are public information . . . of which shippers should be aware." *Illinois Central Gulf Railroad Co. v. Golden Triangle Wholesale Gas Co.*, 586 F.2d 588, 592 (5th Cir. 1978).

In a landmark decision, this Court in *Pittsburg, C.C. & St. L.Ry. v. Fink* 250 U.S. 577, 40 S.Ct. 27, 63 L. Ed. 1151 (1919) established that the policy of the Interstate Commerce Act demands that the carrier receive full payment in every case. Section 7 of the Bill of Lading (TR107) provides "The owner or consignee shall pay the advances, tariff charges, packing and storage, if any, and all other lawful charges accruing on said property . . . ." In addition, the statute, 49 U.S.C. § 10744, and the long established case law make the consignee/beneficial owner liable for the freight charges. In *Louisville & N.R.R. v. Central Iron & Coal Co.*, 265 U.S. 59, 70, 44 S.Ct. 441, 444, 68 L. Ed. 900 (1924), this Court determined, "if a shipment is accepted, the consignee becomes liable as a matter of law for the full amount of the freight charges whether they are demanded at the time of delivery or not until later. His liability satisfies the requirements of the Interstate Commerce Act."

The decision by the Court of Appeals is contrary to *Fink* and *Central Iron*.

What Frontier and Ludwig may have contracted to do in the acquisition of the mobile lounges by Frontier should not affect Frontier's liability for the freight charges to C & H. Frontier had involvement from the beginning and continued with a representative at the C & H loading in Beaumont, Texas, and at the destination, the Frontier facility, Stapleton International Airport, Denver, Colorado. Frontier had its logo on the mobile lounge, a substantial monetary interest in the unit at the time of its shipment and delivery, and received great benefit from its delivery in good order by C & H at Denver. C & H must be able to proceed against Frontier. If not, it will allow the consignor and consignee/beneficial owner of the goods to receive the benefit of a regulated transportation service without payment thereby permitting both interested parties to avoid payment of the lawful freight charges. Nothing should preclude the carrier from

enforcing payment of the full amount by one liable for the freight charges. See *Central Iron*, Supra, 44 S.Ct. at 442.

If this Court permits the erosion of this basic legal premise to continue, then regulated carriers can expect an increase in the response like C & H got from Frontier when contact was made about the charges that: ". . . it was not their problem." (TR101).

In fact, this Court recently determined that a carrier's technical, illegal action in violating the I.C.C.'s credit regulations did not preclude the carrier's collection of the lawful freight charges. The purpose of the rule is to protect carriers and not to penalize them. *Southern Pacific Transport Co. v. Commercial Metals Co.*, supra.

Just because a bill of lading is marked "to be prepaid" or "prepaid" should not relieve a consignee of its statutory responsibility. In effect, a consignee is presumed to know that it will not get a "free ride" when the consignee is a beneficiary of a valuable service and should have to pay for it. It is clear in the *Central Iron* case, supra, the carrier has recourse against both the shipper and the consignee for payment of charges. *Empire Petroleum Co. v. Sinclair Pipeline Co.* (C.A.Colo. 1960) 282 F.2d 913; *Northwestern Pac. R. Co. v. Burchwell* (C.A.Ala. 1965) 394 F.2d 497; *Southern Ry. System v. Leyden Shipping Corp.* (D.C.N.W. 1968) 290 F.Supp. 742; *Southern Pac. Co. v. Miller Abattoir Co.* (C.A.N.J. 1972) 454 F.2d 357. This area of consignee liability for freight charges is the only one in which the lower courts have strayed from the concept of absolute liability for both consignor and consignee. In other areas of affirmative defenses or offsets, the lower courts have not permitted a distinction of this Court's decisions in *Fink* and in *Central Iron*, supra, requiring the collection of tariff charges by motor carriers regardless of a contrary agreement with the shipper; misquotation of rates; the existence of claimed damage to the

cargo; or other such equitable defenses. The only other bar to recovery has been the expiration of the three-year statute of limitations. *Locust Cartage Co. v. Transamerica Freight Lines, Inc.* (C.A.Mass. 1970) 430 F.2d 334 (*cert. denied,* 400 U.S. 964); *Penn Cent. Transp. Co.* (C.A.Penn. 1972) 477 F.2d 841 (*cert. denied,* 414 U.S. 923); *Chicago, B & O R. Co. v. Ready-Mixed Concrete Co.* (9th Cir. 1973) 487 F.2d 1263.

The lower courts holding that estoppel is available under some circumstances have reasoned that the *Fink* case does not apply where the effect of recognizing the estoppel is not to permit the collection of a different rate. *Southern Pacific Transportation Co. v. Campbell Soup Co.,* 455 F.2d 1219 at 1222; *Consolidated Freightways Corp. of Del. v. Admiral Corp.,* 442 F.2d 56 at 62-63. Such cases hold: (1) there can be no presumption the consignee knows that a shipment designated "prepaid" by the carrier has not in fact been prepaid; (2) when the question is not the amount of the freight charge, but merely which party is to be responsible for paying that amount, the possibility of discrimination in rates is not involved; (3) the purpose of the legislation is not thwarted by holding that a carrier may be estopped to collect its freight charges from the consignee, and must look solely to the shipper.

Such cases are in error. Consignee's obligation to pay the charges arose when it accepted the goods as did Frontier. Whatever obligations were imposed upon the consignor were assumed by consignee with the acceptance of the bill of lading and possession of the goods as beneficial owner. There is no provision in Section 7 of the uniform bill of lading that if the bill of lading is marked "prepaid" or "to be prepaid," the consignee or beneficial owner may escape liability for the lawful freight charges when consignee accepts the freight shipment. The fact that a bill of lading is marked "prepaid" or "to be prepaid" should have no significance so far as the liability of the consignee

is concerned. By the lower courts moving in the direction of relieving the consignee under such circumstances, the courts have strayed from the clear language of the decisions by this Court in *Fink* and *Central Iron.*

Equitable considerations should not be applied as the basis for an estoppel to collect authorized tariff charges. C & H has not only the right but also the duty to recover its proper charges for services performed. To permit an equitable defense opens a pandora's box of factors in deciding in each case for the collection of freight charges from consignee whether or not to enforce consignee's statutory liability as well as a liability created by the carrier's Bill of Lading, §7. To be consistently effective, the carrier's ability to collect its freight charges from the consignor and consignee/beneficial owner must remain inflexible. In *Consolidated Freightway Corp v. Admiral Corp.* supra, the Court, by a divided vote, held the carrier estopped. However, this approach, as pointed out by Chief Judge Swygert in his dissent in *Admiral,* disrupts the policy initially established in 1919 by the Supreme Court in the *Fink* case. Congress intended to impose absolute liability for freight charges upon a consignee/beneficial owner. The case at bar firmly emphasizes the importance of flexibility in the collection process in that if the judgment of the Trial Court and Decision of the Court of Appeals are permitted to stand, C & H will have performed substantial, regulated transportation service in Interstate Commerce without payment of the freight charges by either the consignor or consignee/beneficial owner, both of whom got material benefit from such service. This Court should require the same principles be followed which were enunciated in *Fink* and *Central Iron.* In *Louisville & N. R. Co. v. Central Iron & C. Co.,* supra, the consignee had paid the freight demanded by the carrier upon delivery, but the carrier discovered three years later that consignee had not been charged enough. Carrier then brought an action against the shipper, who refused to pay. The Supreme

Court again stated that the amount of freight was fixed by law and could not be varied:

> "... Nor could any act or omission of the carrier (except the running of the Statute of Limitations) estop or preclude [the carrier] from enforcing payment of the full amount by a person liable therefor." 265 U.S. at 65,44 S.Ct. at 442, 68 L.Ed. at 902.

The Court reaffirmed the liability of the consignee in the following language:

> "... under the rule of the Fink Case, if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges whether they are demanded at the time of delivery, or not until later." 265 U.S. at 70, 44 S.Ct. at 444, 68 L.Ed. at 904.

Turning to a second issue, a motion for Summary Judgment should be granted only if there is no genuine issue as to any material fact and the moving party, as a matter of law, is entitled to judgment. *Chavez v. Noble Drilling Corp.*, CA LA. 1978, 567 F. 2d. 287. The decision in the case at bar is contrary to *Chavez*. The lower Court's function in deciding a Summary Judgment motion is not to try factual issues, but rather to determine whether any material issues of fact exist to be tried. *Travelers Indemnity Co. v. M.S. Kiso Maru, D.C.N.Y. 1979, 471 F. Supp. 898*. A Summary Judgment is appropriate only when there are no disputed issues of fact and only legal issues remain. *Allen v. Beneficial Finance Co.*, D.C.Ind. 1975, 393 F. Supp. 1382, affirmed 531 F. 2d. 797, cert. den. 97 S. Ct. 237, 429 U.S. 885, 50 L.Ed. 2d. 166.

Essential facts are in dispute. Genuine fact issues are found as to whether Frontier acted to its detriment in reliance on

misrepresentations made by C & H. There is no showing that actual freignt charges were paid by Frontier. Payments were made under a contract betwen Frontier and its manufacturer for the sale and purchase of six mobile lounges for $2,904,760.00. Frontier's affidavit states that a final payment was made on September 2, 1981, but there is no indication that all money due under the contract was paid by Frontier to Ludwig. There is a question as to whether additional contract payments may have been due but not made after notification in September or early October, 1981 by C & H to Frontier that the freight charges had not been paid and demand made for payment. (TR55,56).

There is no complete absence of conduct by C & H that it would look to Frontier for payment of the freight charges. Ludwig is not a regular customer of C & H and there was no history of continuous shipments for Ludwig or between Ludwig and Frontier by C & H. This was a single shipment in which a special service was performed by C & H to accelerate delivery of the first of six mobile lounges to Frontier. This acceleration was done at the request and direction of Frontier. Appellee was also involved viewing the shipment loaded on C & H equipment at Beaumont and unloaded at the Frontier facility in Denver. Frontier top management employees were present in Denver for the delivery and the C & H Bill of Lading was altered by a person at Frontier's facility to reflect Frontier as the consignee (TR108, 109). Frontier says these representatives were not authorized. (TR54-56). C & H understood that Frontier was the consignee of the shipment. (TR109). C & H had no knowledge of Ludwig's bankruptcy until after November 9, 1982, when it was filed, and the notice was not issued until March 29, 1982. C & H did not make any false representations to Frontier regarding the status of its freight charges or that the freight charges had been prepaid by Ludwig. C & H's bill indicated on its face that no freight charges had been prepaid. This pertinent section makes provision for entries when prepayment of the charges has been received.

Frontier employees were present when the involved shipment was delivered and were privy to C & H's Bill of Lading Contract (TR102).

Frontier did not detrimentally rely on any representation made by C & H. Frontier payments to Ludwig were not conditioned upon Ludwig establishing the involved freight charges had been paid. (TR103).

These are illustrations of material facts which are in dispute and relate to genuine issues. Equitable estoppel arises when one wrongfully or negligently, by acts or representations, causes another who has a right to rely on such acts or representations to change position to its detriment. The burden of proving estoppel and the material facts to support estoppel is on the party claiming the affirmative defense.

The case primarily relied on by the Fifth Court of Appeals is *Consolidated Freightways Corp. vs. Admiral Corp.* 442 F.2d 56 (7th Cir.1971). Any reliance on *Admiral* as determinative of any estoppel issue in this case is not correct. There are several differences, but some that form a common thread in *Admiral* and this line of cases are these. The carrier and consignor had multiple shipments involved over extended periods of time. For example, in *Admiral*, the consignor would send bills for tariff charges to the consignee pursuant to bills of lading received from the carrier which were marked "prepaid." In *Admiral*, consignee paid the proper tariff charges to the consignor pursuant to Bills of Lading received from the carrier which were marked "prepaid." In addition, the carrier in *Admiral* made false representations to the consignee regarding the status of its freight charges. At delivery, the carrier provided consignee with documents explicitly representing that the freight charges had been paid when in fact no such payment had been made. The Bills of Lading were marked "prepaid — bill W.A. Rogers" (who was a freight forwarder) or "Revenue Bill is prepaid." The carrier had a history

of continuous dealings with consignor Rogers. During this extended period, Rogers often failed to make payment of the carrier's invoices within the time limits. Consolidated allowed those charges to accumulate and failed to notify Admiral. Admiral had retained the services of Rogers for freight and customs clearance on foreign traffic. Rogers advanced inland freight charges and invoiced Admiral for those charges. Admiral relied on carrier's explicit misrepresentations that its freight charges had been paid and paid Rogers invoices accordingly which set out the freight charges.

The extended period in *Consolidated vs. Admiral* over which freight charges were directly involved and directly collected in a separate billing by the consignor, and in which the carrier participated over an extended period explicitly indicating prepayment, make that fact situation easily distinguishable.

Frontier simply had a contract for the manufacture of six vehicles for a contract price which assertedly included freight charges. Payments made under the contract by Frontier to Ludwig were made, if there was compliance with the contract by Frontier, at least in part before C & H was ever involved. There are no facts presented which would support any conclusion that any of those contract payments were made by Frontier in any way in reliance upon action or inaction by C & H. In fact, there is no affirmative statement that the full contractual price had been paid by Frontier prior to notification by C & H to Frontier and demand for the payment of freight charges to Frontier some time after labor day and probably around October 1, 1981. There is reference to a final payment having been made on September 2, 1981, but no affirmation of the payment schedules being met, and that all monies had been paid by Frontier to Ludwig under such contract. (TR55,56).

In *Admiral*, separate billings for freight charges were made by the carrier to the consignor and in turn for freight charges only

by the consignor to the customer consignees over long, continuing periods involving multiple shipments. To the contrary, Frontier in making its payments did not rely upon the content of the C & H Bill of Lading, had not received any affirmative and explicit representation that the freight charges for this single movement had ever been paid by Ludwig, and did not rely on the C & H credit practices related to this single shipment. Frontier's failure to affirmatively show that it rightfully relied upon C & H's action or inaction, including credit practices to its detriment causes Frontier to fail in its effort to meet its burden to prove the elements of estoppel.

Finally, the consignee in *Admiral* had no means by which to protect itself from freight charge liability. In this case, Frontier could have protected itself completely simply by inquiring of Ludwig at some point during a four months period whether or not Ludwig had complied with the contract between Frontier and Ludwig by paying the freight charges. C & H was not a party to that contract and had no knowledge of its contents at the time of the shipment. C & H did not wait until Ludwig had filed a petition in bankruptcy to assert its claim against Frontier. Frontier admits that demand was made orally by C & H for the payment of the freight charges no later than early October, 1981. (TR55). The bankruptcy petition was filed by Ludwig on November 9, 1981 (TR101). C & H reiterates, the consignee in *Admiral* had paid the proper tariff charges to the consignor pursuant to Bills of Lading received from the carrier which were marked prepaid. Frontier made no payments to Ludwig based on any document received from C & H directly or indirectly.

The grant of Summary Judgment was improper.

This Court should reaffirm its earlier decisions in *Pittsburg, C.C. & St. L. Ry v. Fink* and *Louisville & N. R. Co. v. Central Iron & Coal Co.* Alternatively, the Court should determine

Summary Judgment was not proper, and the Court of Appeals' decision is contrary to the earlier decision in *Chavez* relating to the scope of the Summary Judgment procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Petition for Writ of Certiorari has been served on Counsel for Respondent Frontier Airlines, Inc. by placing a copy of same in the United States Mail, postage prepaid, on this 13 day of March, 1984, addressed to Mr. Charles L. Perry, Johnson, Bromberg & Leeds, 4245 InterFirst Two, Dallas, Texas 75270.

Ralph W. Pulley
Ralph W. Pulley, Jr.

A. Decision of Fifth Circuit Court Appeals.

B. Memorandum of Opinion and Order United States District Court Northern District of Texas.

C. Judgment United States District Court Northern District of Texas.

D. List of Constitutional Provisions and Statutes.

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1297
Summary Calendar

C & H TRANSPORTATION CO., INC.,
Plaintiff-Appellant,

versus

FRONTIER AIRLINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

(December 16, 1983)

Before CLARK, Chief Judge, RUBIN and JOLLY, Circuit Judges.

PER CURIAM:

C & H, a motor common carrier regulated by the Interstate Commerce Commission, seeks to recover from Frontier Airlines freight charges for transporting a vehicle. In July 1980, Frontier agreed to buy six terminal-to-airplane passenger vehicles or

"mobile lounges" from Ludwig Honold Manufacturing Co. (Ludwig) for $461,410 each. In May 1981, Frontier issued a purchase order to buy the first mobile lounge for $589,960, including $127,000 for expedited shipment to Denver. The agreed delivery site was the Frontier Airlines Hangar, Stapleton Airport, Denver.

The mobile lounge was transported by barge from Delaware to Beaumont, where it was picked up by C & H for transport to Denver. C & H issued a bill of lading on which the block marked "to be prepaid" was checked; the section for acknowledgement of freight-charge prepayment was left blank. The consignee was identified as "City of Denver Airport Stapleton Intl." Ernesto Furtado, an employee of Ludwig, signed for the consignee; someone also wrote in "Frontier airline" as consignee. John Phillips, Frontier's director of purchasing, stated in his affidavit that no one, including Furtado, was authorized to write in the name of Frontier as consignee. However, Frontier's counsel agreed that, for the purpose of its motion for summary judgment, Frontier occupies a position analogous to a consignee.

After the mobile lounge arrived at the Denver Airport, Ludwig performed make-ready work on it and delivered it to Frontier. Frontier filed an affidavit by its director of purchasing which stated that the airline had "made its final payment to Ludwig Honold pursuant to the Sales Agreement."

After that payment had been made, Frontier's director of purchasing received a phone call from C & H's traffic manager demanding payment of the freight charges. Frontier's purchasing director stated that Frontier had paid Ludwig for the freight as part of the contract price, and would not pay it a second time. Ludwig filed a bankruptcy petition soon thereafter. Therefore, if C & H cannot collect from Frontier, it must stand in line as an unsecured creditor of the bankrupt manufacturer.

In response to Frontier's motion for summary judgment, C & H filed affidavits by its traffic manager stating that this shipment was C & H's only business transaction with Ludwig. He also stated that, at the time of the shipment, C & H did not know of Ludwig's impending bankruptcy and that C & H had been led to believe that the airport was consignee of the shipment.

The district court granted Frontier's motion for summary judgment and held that C & H was estopped from collecting the freight charges from Frontier because the airline had detrimentally relied on the bill of lading's representation that the carrier was to be paid by the consignor. The appeal raises two principal issues.

I.

C & H contends that, as a matter of law, the estoppel defense is foreclosed by the public policy that full tariff rates must be collected for freight charges without any discrimination in the charging and collecting of those rates. This requires one payment of the charge in full. When collection of the charges would require a party to make double payment, however, courts have protected the consignee against paying twice for the same shipment. Southern Pac. Transp. Co. v. Campbell Soup Co., 455 F.2d 1219, 1222 (8th Cir. 1972); Consolidated Freightways Corp. v. Admiral Corp., 442 F.2d 56, 58-60 (7th Cir. 1971); Missouri Pac. R.R. v. National Milling Co., 409 F.2d 882 (3d Cir. 1969); Farrell Lines, Inc. v. Titan Industrial Corp., 306 F. Supp. 1348 (S.D.N.Y. 1969), *aff'd*, 419 F.2d 835 (2d Cir. 1969), *cert. denied*, 397 U.S. 1042, S.Ct. , L.Ed.2d (1970); Missouri Pac. R.R. v. Lake Charles Grain and Grocery Co., 320 F. Supp. 1064 (W.D. La. 1971). In these cases, shipment was pursuant to a "prepaid" or "to be prepaid" bill of lading, the consignee paid shipping charges to the consignor or a shipping agent, and the carrier attempted to collect the charges from the

consignee when the consignor or agent was unwilling or unable to pay.

We approved the rationale expressed in *Admiral* and extended it in Southern Pac. Transp. Co. v. Commercial Metals Co., 641 F.2d 235, 237-38 (5th Cir. 1981), *rev'd,* 456 U.S. 336, 102 S.Ct. 1815, 72 L.Ed.2d 114 (1982), to cases that would not result in double payment. When the Supreme Court reversed our *Southern Pacific* decision, it distinguished *Admiral* and other double payment cases. The Court explained that

> none of these cases turned solely on a carrier's violation of credit regulations. Each and all of them involved a carrier's misrepresentation, such as a false assertion of prepayment on the bill of lading, upon which a consignee detrimentally relied only to find itself later sued by the carrier for the same freight charges. We find that these double payment cases constitute their own category and stand against the placement of duplication of liability upon an innocent party. See *Consolidated Freightways Corp. v. Admiral Corp.*, 442 F.2d at 65 (STEVENS, J., concurring).

Id. at 351, 102 S.Ct. at 1824, 72 L.Ed.2d at ______. Thus, *Admiral* continues to provide the controlling principle and we must reject C & H's contention that the estoppel defense is unavailable in double payment cases.

II.

C & H contends that the trial court erred in rendering summary judgment because genuine dispute remains as to whether Frontier acted to its detriment in reliance on representations made by C & H, whether Frontier actually paid the freight charges to Ludwig, and whether additional payments may have been due Ludwig by Frontier after C & H notified Frontier that the freight charges had not been paid.

It is undisputed, however, that the bill of lading indicated that the freight charges were "to be prepaid." "In the trade, this notation signifies that freight charges will be paid by the shipper." *Campbell Soup,* 455 F.2d at 1220. Furthermore, the affidavit filed by Frontier states that Frontier agreed to pay and did pay as part of the purchase price the expenses of transporting the mobile lounge, and that Frontier had in fact made the final payment due Ludwig before C & H sought payment from Frontier. This representation is supported by Frontier's exhibits.

C & H is required by law to collect freight charges within five days. Southern Pac. Transp. Co. v. Commercial Metals Co., 456 U.S. at 341 & n.6, 102 S.Ct. at 1819 & n.6, __ L.Ed.2d at __ & n.6 (quoting 40 C.F.R. § 1320.1 (1981)). Having failed to do so, C & H did not make demand on Frontier until four or five months later. If C & H had promptly notified Frontier, perhaps the airline could have withheld the funds to pay C & H.

C & H argues that there is no history of dealings between the parties that would permit Frontier to rely on C & H's conduct. It also attempts to distinguish *Admiral* and In re Roll Form Products, 662 F.2d 150 (2d Cir. 1981), as involving multiple dealings between the consignor and the carrier over extended periods of time. In *Admiral,* moreover, the carrier falsely represented that the consignor had paid the freight charges. The other decisions discussed in section I, however, do not support the proposition that these factors are essential to the estoppel defense.

The only matters in the record that could be said to contradict Frontier's evidence is a paragraph in an affidavit filed by C & H's traffic manager which states: "That Defendant, Frontier Airlines, did not detrimentally rely on any representation made by Plaintiff, C & H. That Defendant's, Frontier Airlines,

payments to Ludwig Honold were not conditioned upon Ludwig Honold establishing that the involved freight charges had been paid." C & H relies on these statements to show that genuine issues of material fact remain.

Federal Rule of Civil Procedure 56(e) provides in part:

> Supporting and opposing [summary judgment] affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein . . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

The statements made in the affidavit of C & H's traffic manager obviously are not based on his personal knowledge. They are conclusory in nature and set forth no facts, even as hearsay, that would create a genuine dispute of fact. They do not therefore establish that issues of fact existed contrary to Frontier's affidavit. Accordingly, they do not create a genuine issue of fact that will withstand summary judgment. *See* Barker v. Norman, 651 F.2d 1107, 1123 (5th Cir. 1981); CMS Industries v. L.P.S. Int'l, Ltd. 643 F.2d 289, 295 (5th Cir. 1981). No other affidavits were filed, no depositions were taken, and no continuance was sought for these purposes.

For these reasons the judgment is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

C & H TRANSPORTATION CO., INC. *Plaintiff*	
v.	CIVIL ACTION NO. 3-82-0842-H
FRONTIER AIRLINES, INC. *Defendant*	

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendant Frontier Airlines, Inc.'s ("Frontier") Motion for Summary Judgment, filed October 4, 1982; Plaintiff C & H Transportation Company's ("C & H") Opposition thereto, filed November 1, 1982; Frontier's reply to C & H's opposition, filed November 15, 1982; and C & H's response thereto, filed November 26, 1982. After reviewing the motion, the memoranda submitted, the record in this case, and the applicable law, the Court concludes that there are no genuine issues of material fact concerning Frontier's estoppel defense and that Frontier is entitled to judgment as a matter of law.

This is a "bill of lading" case, in which C & H seeks $7,868.63 in freight charges allegedly owed by Frontier as consignee of a

"Plane-Mate Mobile Lounge" ("lounge") transported by C & H from Delaware to Colorado. The sole issue presented in this motion for summary judgment is whether an interstate carrier who delivers goods under a bill of lading marked "To Be Prepaid" is estopped from recovering freight charges from a consignee who has detrimentally relied upon the representations in the bill of lading that the carrier was to be paid by the consignor.

This precise issue was addressed in *Consolidated Freightways Corp. v. Admiral Corp.*, 442 F.2d 56 (7th Cir. 1971), which was recently cited with approval in *Southern Pacific Transp. Co. v. Commercial Metals Co.*, U.S. , 102 S.Ct. 1815 (1982). *See also In re Rolls Form Products, Inc.*, 662 F.2d 150 (2d Cir. 1981); *Missouri Pacific Railroad Co. v. Nat'l Milling Co.*, 409 F.2d 882 (3rd Cir. 1971); *Missouri Pacific Railroad v. Lake Charles Grain & Grocery Co.*, 320 F. Supp. 1064 (W.D. La. 1971). In *Admiral* the defendant was a consignee to whom goods were delivered under a bill of lading marked "prepaid." Relying upon this representation, the consignee paid the freight charges to the consignor, who in turn went out of business before he in fact paid the carrier the freight charges. When the carrier was unable to collect from the consignor, he turned to the consignee for payment of the freight charges. The Seventh Circuit held that under these circumstances the carrier was estopped from collecting the charges from the consignee. As Justice Stevens noted, to hold otherwise would

> require an innocent consignee to defray freight charges exactly double the amount contemplated by the applicable tariffs.

Id., 442 F.2d at 65 (Stevens, J., concurring).

Likewise, in this case, C & H is estopped from recovering the freight charges from Frontier. The sales agreement between

Frontier, the consignee, and Ludwig, the consignor, specified that Frontier would pay Ludwig the cost of transporting the lounge to Colorado. Consistent with that agreement, the lounge was delivered under a bill of lading that was marked "To Be Prepaid" by the consignor. Further the bill of lading did not contain an executed "non-recourse" provision, which would have required Frontier to pay upon delivery. Relying upon the representations contained in the bill of lading, Frontier paid Ludwig the full price of the lounge which included the cost of transporting it from Delaware to Colorado. Although the bill of lading was marked "To Be Prepaid," Ludwig had not in fact paid C & H prior to shipment. After delivering the lounge, C & H attempted to collect the freight charges from Ludwig. After discovering that Ludwig had filed a bankruptcy petition, C & H then demanded payment from Frontier. However, this demand was not made until four months after the lounge had been delivered, by which time Frontier had already paid Ludwig the freight charges. Under these circumstances, equity requires that C & H be estopped from recovering the freight charges from Frontier, to protect Frontier from double liability occasioned by detrimental reliance upon C & H's bill of lading. *Commercial Metals,* 102 S.Ct. at 1822; *Admiral,* 442 F.2d at 59.

Accordingly, Frontier's Motion for Summary Judgment is hereby GRANTED.

SO ORDERED.

DATED: April 8, 1983.

Barefoot Sanders
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

C & H TRANSPORTATION CO., INC. *Plaintiff* v. FRONTIER AIRLINES, INC. *Defendant*	CIVIL ACTION NO. 3-82-0842-H

JUDGMENT

On April 8, 1983, the Court filed its Memorandum Opinion and Order pursuant to which Defendant Frontier is entitled to judgment.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED by the Court that Plaintiff C & H Transportation Company, Inc. take nothing by its suit against Defendant Frontier Airlines, Inc., and that this suit be, and it is hereby, DISMISSED on the merits at Plaintiff's cost.

SIGNED this 8th day of April, 1983.

Barefoot Sanders
United States District Judge

APPENDIX D

28 USC § 1337

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

49 USC § 10744. Liability for Payment of Rates

(a)(1) Liability for payment of rates for transportation for a shipment of property by a shipper or consignor to a consignee other than the shipper or consignor, is determined under this subsection when the transportation is provided by a rail, motor, or water common carrier under this subtitle. When the shipper or consignor instructs the carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates that may be found to be due after delivery if the consignee gives written notice to the delivering carrier before delivery of the property—

(A) of the agency and absence of beneficial title, and

(B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

(2) When the consignee is liable only for rates billed at the time of delivery under paragraph (1) of this subsection, the shipper or consignor, or, if the property is reconsigned or diverted, the beneficial owner, is liable for those additional rates regardless of the bill of lading or contract under which the property was transported. The beneficial owner is liable for all rates when the

property is reconsigned or diverted by an agent but is refused or abandoned at its ultimate destination if the agent gave the carrier in the reconsignment or diversion order a notice of agency and the name and address of the beneficial owner. A consignee giving the carrier, and a reconsignor or diverter giving a rail carrier, erroneous information about the identity of the beneficial owner of the property is liable for the additional rates.

49 USC § 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service or another device.

49 USC § 10762. General tariff requirements

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other

information that motor common carrier shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under a certificate to which the provisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

(2) Carriers that publish tariffs under paragraph (1) of this subsection shall keep them open for public inspection. A rate contained in a tariff filed by a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of chapter 105 shall be stated in money of the United States. A tariff filed by a motor or water contract carrier or by a freight forwarder providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of that chapter, respectively, may not become effective for 30 days after it is filed.

28 USC § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.